No. 82-703

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Supreme Court of the United States

OCTOBER TERM, 1982

BOROUGH OF MILLTOWN,
Petitioner,

and by separate petition

MIDDLESEX COUNTY UTILITIES AUTHORITY,
Petitioner,

v.

CITY OF NEW BRUNSWICK, and THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION OF THE BOROUGH OF MILLTOWN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Whether Congress intended the grant-conditioning power delegated to the United States Environmental Protection Agency (EPA) pursuant to 33 U.S.C. §1284 (b)(1)(A) to authorize regulation of a municipality that is neither a grantee nor a party contracting with a grantee—whether this is a case of regulatory overreach?

2. Whether Congress intended 33 U.S.C. §1284(b)(1)(A), which is part of the Federal Water Pollution Control Act of 1972, to abrogate an existing intermunicipal contract entered into in 1914, notwithstanding legislative history requiring EPA to "take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction" and to permit "reasonable flexibility . . . that meets the unique requirements" of each jurisdiction?*

3. Whether Congress intended a rigid reading of 33 U.S.C. §1284(b)(1)(A) requiring absolute proportionality and disallowing flexibility—the impact of the Third Circuit's opinion below, or whether Congress intended "generally equitable" treatment with an "emphasis upon local flexibility", as held by the Ninth Circuit this year?**

4. Whether a court should accord full deference to an administrative agency where the questions presented are matters of statutory construction, not technical ex-

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*2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1352-1353 (U.S. Government Printing Office, 1973).

** *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305, 1308-09 (9th Cir. 1982).

pertise, and where the issue is the statutory jurisdiction of the agency itself?

5. Whether as a matter of constitutional law and policy, 33 U.S.C. §1284(b)(1)(A) should have been construed to avoid the contract impairment/due process issue resulting from a decision that derogates from substantial contractual rights under a long-standing written agreement?

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Opinions Below

The Court of Appeals, Third Circuit, filed its opinion July 22, 1982. It is not reported (Appendix 1a-29a). The opinion of the District Court, New Jersey, is reported at 519 F. Supp. 878 (1981) (Appendix 33a-52a). The judgments are set forth below (Appendix 30a-32a, 53a-56a).

Jurisdiction

Jurisdiction of this Court is conferred by 28 U.S.C. §1284; that of the Court of Appeals by 28 U.S.C. §1291; and that of the District Court by 28 U.S.C. §1442(a)(1).

Constitution and Statute

United States Constitution, Article I, Paragraph 8, clause 1 is quoted below at page 6 and 33 U.S.C. §1284 (b)(1)(A) is quoted below at page 5.

Statement of the Case

In 1914, two New Jersey municipalities entered into a written contract to settle a dispute. For substantial consideration, the City of New Brunswick (New Brunswick) agreed to dispose of sewage delivered by the Borough of Milltown (Milltown). Both parties have performed the contract to date.

This sewage disposal contract has been twice sustained against challenges advanced by New Brunswick. See *New Brunswick* v. *Milltown,* 135 N.J. Eq. 310, 38 A.2d 288 (Ch. 1944); *New Brunswick* v. *Milltown,* 3 N.J. Super. 113, 65 A.2d 621 (App. Div. 1949).

In a new challenge, commenced in the Superior Court of New Jersey, New Brunswick again sought abrogation of its contract with Milltown. New Brunswick's complaint included a federal ground, namely, that 33 U.S.C. §1284(b)(1) required New Brunswick to charge Milltown for sewage disposal, its contractual obligation to the contrary notwithstanding.

The Complaint also named the Middlesex County Utilities Authority (MCUA), a regional sewage authority, as a party defendant. New Brunswick had contracted with MCUA for disposal of New Brunswick's sewage (including Milltown's). Milltown did not contract with MCUA. Milltown was not consulted and did not consent to New Brunswick's contract with MCUA.

The Complaint against MCUA sought an order requiring MCUA to directly charge Milltown for the cost of disposing of Milltown's sewage. MCUA denied it had the power to so act, alternatively crossclaimed against Milltown, and additionally brought a third party complaint against EPA.

EPA had previously withheld part of a grant it had made to MCUA for construction of treatment facilities. MCUA's third party complaint against EPA alleged the withholding was improper and sought payment. EPA removed to the District Court, 28 U.S.C. §1442(a)(1), and filed reponsive pleadings.

Cross-motions for summary judgment resulted in an order sustaining EPA's power to withhold the grant on the ground that Milltown, under its contract with New Brunswick, was not itself paying for sewage disposal. The balance of the case was remanded for adjudication of state issues.

Milltown and MCUA appealed. The Third Circuit affirmed. MCUA has petitioned for certiorari to this Court. Because of the obvious detriment to Milltown—the federal determination will likely be regarded as settled law and the New Jersey courts may well consider this novel precedent as a "material change" compelling abrogation of the Milltown/New Brunswick contract, see *New Brunswick* v. *Milltown*, *supra* (3 N.J. Super. at 121, 65 A.2d at 624)—Milltown seeks relief here.

ARGUMENT

An analysis of the issues is presented at Points I through V. A summary of the reasons why certiorari should be granted is set forth at Point VI.*

POINT I

Because the grant-conditioning power in §1284(b)(1)(A) is contractual in nature and attaches only to a party which "voluntarily and knowingly accepts the terms of the 'contract' ", Congress never intended that statute to reach Milltown which neither applied for a grant nor contracted with a grantee. Certiorari should be granted and the contrary decision of the Court of Appeals should be reversed.**

A. Statutory context.

The statute in question is part of a grant program: 33 U.S.C. §1281(g)(1) authorizes "grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works." Pursuant thereto, MCUA applied for a grant and EPA awarded the grant.

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* Milltown's perspective is different than that of MCUA. Indeed, these parties are adversaries in pending State court proceedings involving related issues. Nevertheless, Milltown finds itself in substantial agreement with the analysis set forth in MCUA's petition for certiorari, at pages 8 to 22, and respectfully relies upon the points advanced therein.

** *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981).

The grant program is contractual in nature. The applicant submits a proposal and the EPA Administrator's "approval of any such plans, specifications, and estimates shall be deemed *a contractual obligation* of the United States for the payment of its proportional contribution to such project." 33 U.S.C. §1283(a); emphasis added. As such, the legislation is unusual because Congress has agreed in advance of appropriations to fund what has been contractually obligated within certain authorization limits. See *Train* v. *City of New York*, 420 U.S. 35, 39 at n. 2 (1975).

The statutory section at issue here is a component of the contractual grant program. It provides that:

> ". . . the Administrator shall not approve any grant for any treatment works under Section 1281(g)(1) [quoted above] . . . unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant. . . ." 33 U.S.C. §1284(b)(1).

Acting under this section, EPA promulgated regulations, 40 C.F.R. §35.929-1 and 2, and withheld grant funds from MCUA for alleged non-compliance.

B. Applicable legal principle.

Unlike an administrative agency's plenary regulatory authority, regulations that are based on grant conditions depend upon consent.

Because the power to make and condition grants derives from the Constitution's Spending Power Clause,* grant statutes are "voluntary and the States [or, as here, instrumentailties of the States] are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding." *Pennhurst State School* v. *Halderman*, supra, 451 U.S. at 11.

As such, grants and conditions thereto are:

> ". . . in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State *voluntarily and knowingly accepts the terms of the 'contract.'* [Authorities omitted.] *Id.* at 17 (emphasis added); *accord*, *State of New Jersey, Dept. of Ed.* v. *Hufstedler*, 662 F.2d 208, 214 (3d Cir. 1981).

As indicated above, the statute in question here provides for "a contractual obligation of the United States," 33 U.S.C. §1283(a), and is therefore consistent with the Supreme Court's analysis in *Pennhurst*.

Acceptance of the grant by MCUA supplies its consent. New Brunswick's agreement to dispose of its sewage through MCUA's facility may supply New Brunswick's consent.

But nothing supplies Milltown's consent. It has neither applied for a grant, nor contracted with a grantee. Certainly, New Brunswick's unilateral decision to dispose of Milltown's sewage—which New Brunswick is bound by

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* The Congress shall have Power To . . . provide for the . . . general welfare of the United States. . . ." *US. Const.*, art. I, §8, cl. 1.

agreement to receive—through MCUA's facility cannot be construed as Milltown's consent to EPA grant conditions.

Thus, Milltown cannot be said to have "voluntarily and knowingly" accepted the terms of "the contract." *Pennhurst State School* v. *Halderman, supra,* 451 U.S. at 17. In this context, taken together with the unique overlay of the Milltown/New Brunswick agreement, it is clear that Congress did not intend that 33 U.S.C. §1284(b)(1)(A) should reach a municipality that was neither a grantee nor a party contracting with a grantee.

C. Statutory language.

The statutory language is consistent with the above analysis. Section 1284(b)(1)(A) reaches "each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator. . . ." The District Court cited the dictionary definition of "recipient" as "one that receives" and concluded that "Milltown is inarguably a 'recipient' of MCUA's treatment services" because Milltown's sewage "receives its only treatment from the MCUA system" (519 F. Supp. at 882; Appendix 40a). The Court of Appeals agreed with the District Court, although it admitted that Milltown was only an indirect recipient (Appendix 13a).

The analysis is erroneous because Milltown receives nothing *from MCUA*. By contract with New Brunswick, Milltown has the right to transmit sewage through a 12 inch pipe to New Brunswick, nothing more. *New Brunswick* v. *Milltown, supra* (3 N.J. Super. at 121, 65 A.2d at 624).

Once the sewage crosses into New Brunswick, the sewage belongs to New Brunswick to dispose of it as it sees fit. Milltown has no right to require or even request that

the sewage be treated in any particular way or by any particular agency. The sewage belongs to New Brunswick, not Milltown, and New Brunswick alone is the "recipient" of any treatment services from MCUA which New Brunswick elects to enjoy. For federal statutory purposes, the sewage should be dealt with no differently than sewage piped from a New Brunswick city facility.

Of even greater significance is the fact that the word "recipient" is limited by the phrase "within the applicant's jurisdiction."*

Plainly, Congress contemplated recipients that are both within and *not* "within the applicant's jurisdiction." Otherwise, the quoted phrase would be surplusage. See *United States* v. *Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), *cert. den.*, 450 U.S. 967 (1981) ("We should not construe a statute to make it redundant of itself. . . ."); *United States* v. *Johnson*, 462 F.2d 423, 428 (3d Cir. 1972), *cert. den.*, 410 U.S. 937 (1973) ("words in statutes should not be construed as excess verbiage"). The question, then, is which recipients are "within the applicant's jurisdiction" and, more particularly, what did Congress mean by "jurisdiction."

It is appropriate to start with the dictionary definition of "jurisdiction." After defining jurisdiction in judicial terms, *Webster's* gives a second definition, "authority of a sovereign power to govern or legislate: *power or right to exercise authority,*" and, for a synonym, "see POWER." *Webster's Third New International Dictionary* 1227 (1963); emphasis added.

Judicial definitions are to the same effect. Dealing with the crime of making a false statement in a matter within

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* The final words—" as determined by the Administrator"—obviously call for a test of reasonableness.

the jurisdiction of a federal department or agency, the Ninth Circuit held "jurisdiction" to be synonymous with *"power to act,"* and the Fifth Circuit concurred. *Ogden* v. *United States,* 303 F.2d 724, 743 (9th Cir. 1962), *cert. den.,* 376 U.S. 973 (1964); *United States* v. *Cartwright,* 632 F.2d 1290, 1292 (5th Cir. 1980); emphasis added.

In the context of a statutory grant of subpoena authority to the Veterans' Administration for matters within its jurisdiction, the Fifth Circuit defined "jurisdiction" as "the right to say and *the power to act;* and, as between agencies of the government, jurisdiction is *the power of that particular agency to administer and enforce the law."* *Carroll Vocational Institute* v. *United States,* 211 F.2d 539, 540 (5th Cir.), *cert. den.,* 348 U.S. 833 (1954) (emphasis added); *accord, Stop H-3 Ass'n* v. *Coleman,* 533 F.2d 434, 441 at n. 13 (9th Cir), *cert. den.,* 429 U.S. 999 (1976); *Gonzales* v. *United States,* 286 F.2d 118, 123 (10th Cir. 1960), *cert. den.,* 365 U.S. 878 (1961).

In summary, the plain meaning of the Congressional language in 33 U.S.C. §1284(b)(1)(A) is that the section was designed to reach *only* recipients within MCUA's ("the applicant's") power to act ("jurisdiction"). It is undisputed that MCUA has no power to act with respect to Milltown because Milltown is not a subscriber to services provided by the MCUA.

Alternatively, it is even more obvious that the statutory language is not free from ambiguity, as is necessary before a user charge requirement can be imposed on Milltown. "If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School* v. *Halderman, supra,* 451 U.S. at 17.

POINT II

The Congressional purpose in enacting 33 U.S.C. §1284 (b)(1)(A) was to get waste treatment plants built; and Congress intended the EPA in achieving that purpose to "take into account the diversity of legal and financial factors . . . from jurisdiction to jurisdiction" and to permit "flexibility in the design of a system of user charges that meets the unique requirements of" each jurisdiction.* The Court of Appeals' decision contravenes this purpose and intent and should be reversed.

A. Overriding purpose.

Although "[t]he starting point in every case involving construction of a statute is the language itself," *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979), the judicial task is "to interpret the words of . . . statutes in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Thus, in construing a statute, "the court must consider the purpose of its enactment, the evil to be eradicated, the object to be obtained and recognize the construction that would best effectuate those standards." *Gartner* v. *Soloner*, 384 F.2d 348, 355 (3d Cir. 1967), *cert. den.*, 390 U.S. 1040 (1968).

The overriding policy applicable to waste treatment grants is to provide financial assistance "to construct publically owned waste treatment works" so as "to restore and maintain the chemical, physical, and biological in-

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*2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1352-1353 (U.S. Government Printing Office, 1973).

tegrity of the Nation's waters." 33 U.S.C. §1251(a)(4); see 33 U.S.C. §1281(g)(1). While a proportional system of charges, 33 U.S.C. §1284(b)(1)(A), may be of some help in the overall decontamination process, the baby is thrown out with the bathwater if, in an attempt to achieve the fringe benefit, the treatment plant itself is not constructed or maintained. Yet that is the position of the EPA and that is the possible result of the Court of Appeals' decision in this case.

In most cases, the applicant and those who subscribe to its services will voluntarily comply with grant conditions, including the system of charges required by 33 U.S.C. §1284(b)(1)(A), to obtain available federal funding. Here, however, a unique situation obtains. Milltown has pre-existing contractual rights and the applicant—MCUA—has no power to compel Milltown to waive those rights.

Surely, Congress did not intend to withhold financial aid to MCUA in these circumstances and thereby to defeat the overriding objective of the act, namely, to get waste treatment facilities built. The statutory construction that "would best effectuate" the Congressional purpose is to read the words "within the applicant's jurisdiction" as excluding municipalities like Milltown that are not within that jurisdiction.

B. Congressional intent.

Neither legislative history, see *A Legislative History of the Water Pollution Control Act Amendments of 1972* (U.S. Government Printing Office, 1973) (hereinafter "Legislative History"), nor any other guides to Congressional intent, confront and solve the precise problem before this Court. Nevertheless, it is valuable to examine what evi-

dence of intent exists and to draw the appropriate inferences. As already indicated, the contractual nature of the constitutional power exercised by Congress, the legislative language used, and the overriding policy of the statute, all demonstrate that Congress did not intend to bind a municipality like Milltown to grant conditions set forth in 33 U.S.C. §1284(b)(1)(A). In addition, there are these points:

1. Flexibility.

At the outset of the act, Congress articulated its policy of shared federal-state responsibility:

> "It is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. *It is the policy of Congress that the States manage the construction grant program* under this chapter. . . ." 33 U.S.C. §1251(b); emphasis added.

As with the legislation considered in *Pennhurst*, Congress here contemplated "federal-state cooperative programs." *Pennhurst State School* v. *Halderman, supra*, 451 U.S. at 11.

It is for this reason that flexibility in implementation of §1284(b)(1)(A) was emphasized in the legislative process. For example (to quote a committee report), while volume and character of each discharge were to be the basis of rate determination "[a]s a general rule,"

> "[t]hese [EPA] guidelines [regulations] should take into account *the diversity of legal and financial factors that exist from jurisdiction to jurisdiction,* and each applicant should be permitted *reasonable flexibility* in the design of a system of user charges that meets *the unique requirements of his own jurisdiction.*" 2 *Legislative History, supra,* 1352-1353; emphasis added.

In quoting this committee report, which gave the "general rule" and the flexibility exception, Senator Muskie commented on the Senate floor:

> "*But the flexibility point is emphasized,* and I think should be, because we are trying to encourage experiments and flexibility." *Id.* at 1353; emphasis added.

And Senator Nelson replied:

> "Mr. President, I thank the Senator. I had assumed, from looking at the act, that that was the intent, but I appreciate the clarification, *so that the legislative intent will be clear from our discussion on the Senate floor.*" Id. at 1353; emphasis added.

To the same effect, see 1 *Legislative History* 295; 2 *Legislative History* 1446.

In the case at bar, the Court will discern absolutely no regard by EPA, or by the Courts below, for the legislative intent concerning flexibility that was to be "clear from our discussion on the Senate floor."* No consideration is

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* The District Court's discussion is superficial and unenlightening (519 F. Supp. at 883; Appendix 42a-43a), and the Court of Appeals completely sidesteps the issue by merely *assuming* that the goal of flexibility does not apply here. The question is begged and the matter is thereupon left. Appendix 22a.

given to "the diversity of legal and financial factors" and "the unique requirements" of the situation presented here. Certainly, this legislative history does not bespeak Congressional intent to ignore or violate the Milltown/New Brunswick contract—an obviously "legal and financial" factor, 2 *Legislative History* 1352-1353—or to overrule state instrumentalities in their exercise of their "primary responsibilities and rights." 33 U.S.C. §1251(b).

2. Self-sufficiency.

The charge system set forth in 33 U.S.C. §1284(b)(1)(A) has one central objective. As stated on the floor of the House of Reprsentatives, "[a]gain, I would like to stress the aim in making user charges is to enable each local system to *achieve self-sufficiency.*" 1 *Legislative History* 368. To the same effect, see 1 *Legislature History* 371; 2 *Legislative History* 1446.

Here, there is no evidence whatsoever that this objective will be compromised by honoring the Milltown/New Brunswick contract. New Brunswick has fully paid MCUA for every gallon of sewerage transmitted and there is no indication that it cannot or will not continue to do so. The lower Courts' speculation that New Brunswick might "break its contract with Milltown and cease paying for the costs of treating Milltown's wastes" (519 F. Supp. at 883; Appendix 42a and 24a n. 18) is patently lacking in record support. Speculation is not a sound basis for judgment. The aim of self-sufficiency is being achieved.

3. Another purpose?

Both lower Courts mistakenly assumed that one of the original Congressional purposes in enacting the subject

legislation was to promote water conservation. 519 F. Supp. at 883; Appendix 42a and 24a-25a. Based on that assumption, the lower Courts believed that Milltown's enactment of a user change would further the purpose of the statute. But the assumption is not valid because the legislative history is silent on the subject of conservation until five years later when (in 1977) Congress amended the Clean Water Act. S. Rep. No. 93-370, 95th Cong., 1st Sess. (1977), reprinted in 1977 *U.S. Code Cong. Ad. & News* 4326, 4352. The 1977 Senate Report states that user charges were "originally proposed" to assure "that each federally assisted facility would have adequate operation and maintenance funds." *Id.* at 4352. The Report then indicates that: "Further examination of the user charge concept revealed additional benefits." *Id.* The conservation purpose is then mentioned as one of the "additional benefits" discovered after enactment of the statute.

The 1977 commentary relied upon by the lower Courts is not the legislative history of the 1972 statute in issue here. "[T]he views of some Congressmen as to the construction of a statute adopted years before by another Congress have 'very little, if any, significance.' [Citations omitted.]" *United States* v. *Clark,* 445 U.S. 23, 33 at n. 9 (1980). As the Fifth Circuit put it:

> "The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

• • •

> "Had this statement been made in the report of the Committee that recommended the legislation, it would indeed be part of the statutory history. When uttered five years later it is mere commentary." *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1080, 1082 (5th Cir.), *cert. den.*, 449 U.S. 889 (1980).

Moreover, the 1977 amendments permit user charges to be based on ad valorem taxes or flat fees which, unlike metering, are not directly related to the use of water. Thus, despite lip service to water conservation in the legislative history of the 1977 amendments, the amendments themselves are contrary to that assumed objective.

Finally, there is no evidence in the record regarding any water conservation issue in this case. The Courts below speculate, but no proofs support their speculation. The lower Courts' "conservation" rationale is more makeweight than meritorious.*

In summary, to the extent that Congressional intent can be gleaned from legislative history, the clearest indication is that flexibility was the goal and unique legal and financial factors, such as those presented by the Milltown/New Brunswick contract, were to receive respect. To require Milltown to enact a user charge does not further the expressed Congressional objective that the EPA should cause waste treatment plants to be built, and such a requirement is also contrary to the expressed Congressional prescription that the EPA, in carrying out the Congressional mandate, should be flexible in designing user charge systems and accommodate the unique legal and financial characteristics of each jurisdiction.

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* There is a cap on New Brunswick's obligation to Milltown: what can be transmitted through a 12-inch pipeline. *New Brunswick* v. *Milltown, supra* (3 N.J. Super. at 121, 65 A.2d at 624). This limitation is far more likely to result in overall conservation in the unique circumstances of this case than the more nebulous theory advanced by the lower Courts.

POINT III

The Ninth Circuit's decision in *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch*, 669 F.2d 1305 (9th Cir. 1982), correctly construed the Congressional intent underlying 33 U.S.C. §1284(b)(1) as requiring tolerance of local variations in user charge systems. The conflicting decision of the Third Circuit in this case should be reversed.

In *Hotel Emp. Ass'n of San Francisco* v. *Gorsuch, supra*, the Ninth Circuit Court of Appeals construed 33 U.S.C. §1284(b)(1)(A) and the legislative history of that statute and reached a conclusion as to the Congressional intent which is the opposite of that reached by the Third Circuit in this case. It is Milltown's position that the Ninth Circuit is correct, and the conflicting decision of the Third Circuit below should be reversed.

In the Ninth Circuit case the plaintiff challenged the EPA's approval of a user charge system. The system charged costs in accordance with sewage flow (based on water consumption) and sewage strength (based on categories of users). While the system was rational, it did not adjust for the fact that sanitary and storm sewage were treated together. Thirty five percent of operating and maintenance costs reflected surface runoff, yet runoff depends upon acreage, not water consumption or sewage strength. Thus, the user charge system nowhere neared true proportionality.

The Ninth Circuit affirmed the District Court's ruling that

> "the section's legislative history suggests that Congress did not intend to impose an 'absolute proportionality' requirement and meant to require 'only

> proportionality which is generally equitable' . . . [P]roportionality, while a general requirement, was not a primary motivation for the enactment of the user fee requirement . . . Congress instead was primarily concerned with ensuring that treatment systems would be self-financing and was tolerant of local variations in user charge schemes so long as this basic requirement was met." 669 F.2d at 1308.

In conclusion, the Ninth Circuit again stressed "the importance Congress placed upon giving localities flexibility in designing user fee systems" and held:

> "The legislative history's emphasis upon local flexibility, however, persuades us against narrowly interpreting Section 204(b)(1) [§1284(b)(1)] to require localities to apportion treatment costs with exacting mathematical precision." 669 F.2d at 1309.

By way of support, the Ninth Circuit quoted (*Id.* at n. 6) the same legislative history language quoted in this petition's discussion of flexibility. (Above p. 13).

The Third Circuit decision below takes the opposite approach to the subject statute. Instead of honoring the Congressional objective of flexibility, the Third Circuit reads the statute narrowly and rigidly as requiring participation by each municipal user. The Third Circuit ignores the unique contractual arrangement between Milltown and New Brunswick.

The Ninth Circuit's construction of the statute carries out the will of Congress and should be followed. The conflicting approach of the Third Circuit should be rejected.

POINT IV

The Courts below erred in according full deference to the EPA where its statutory jurisdiction was at issue and technical expertise was not involved.

Milltown's position is that both Courts below erred in according full deference to the EPA's interpretation of the statute in question. When, as here, the issue involves the statutory jurisdiction of an agency, deference to the agency's own interpretation of the statute should not play a major part in the analysis.

In such circumstances, the Third Circuit had previously defined its scope of review as necessarily entailing "a first-hand judicial comparison of the claimed excessive action with the pertinent statutory authority." *Western Union Tel. Co.* v. *F.C.C.*, 541 F.2d 346, 354 (3d Cir. 1976), *cert. den.*, 429 U.S. 1092 (1977). The Court should itself examine "the entire statutory scheme and the legislative history" and accord deference to the agency's interpretation of the Act only if that interpretation is "more reasonable". *American Iron and Steel Institute* v. *E.P.A.*, 526 F.2d 1027, 1037, 1042 (3d Cir. 1975), *modified on other grounds*, 560 F.2d 589 (3d Cir. 1977), *cert. den.*, 435 U.S. 914 (1978). Thus, to quote this Court:

> "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

Although no evidence of long-standing administrative construction was adduced in this case—the regulations do not expressly deal with the present situation—it is appropriate to note that even in that event "an agency may

not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973); *accord*, *SEC* v. *Sloan*, 436 U.S. 103, 118-119 (1978).

In short, "[a]n agency can neither create nor lawfully expand its jurisdicti[on] by merely deciding what it thinks the future should be like . . . " and "the public interest is not served by agency actions beyond their jurisdiction." *Midwest Video Corp.* v. *F.C.C.*, 571 F.2d 1025, 1045 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

POINT V

The Third Circuit's construction of 33 U.S.C. §1284 (b)(1)(A) derogates from Milltown's substantial contractual rights and thus creates a contract impairment/due process issue. The Third Circuit's decision should be reversed to avoid that result.

This is a statutory construction argument that Milltown wishes to preserve, but concedes is not a proper basis for certiorari in its own right.

The point is that the impact of the administrative and judicial decisions below derogates from Milltown's "substantial contractual rights," *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 431 (1934); see *Lynch* v. *United States*, 292 U.S. 571 (1934); and that this impact could have been avoided—and should have been—by construing 33 U.S.C. §1284(b)(1)(A) as Milltown suggests. *See United States* v. *Clark*, 445 U.S. 23, 27 (1980).

The point can be developed if certiorari is granted.

POINT VI

Certiorari should be granted.

There is substantial error below. In addition, there are these reasons why certiorari should be granted:

1. This Court has not construed the federal statutory section in question here, nor any similar legislation. A decision on the merits will have nationwide impact on how the EPA deals with unique local requirements in this major grant program.

2. A significant federal effort to fund sewage treatment systems and ameliorate water pollution in urban/industrial areas like New Jersey may well be thwarted by the rigidly unrealistic and legally erroneous construction of 33 U.S.C. §1284(b)(1)(A) adopted by the Courts below. Congressional intent in a critical area will be frustrated absent intervention by this Court.

3. The authority of federal administrative agencies to reguate via grant conditions derives from Congressional exercise of constitutionally delegated spending powers. *U.S. Const.*, Art. I, §8, cl. 1. This Court commenced definition of the reach of grant-conditioning regulatory powers in an important decision last year. *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981). The conduct of EPA, the judicial acquiescence in that conduct, the circumstances of this case, and the pervasiveness of federal grant programs, strongly demonstrate the need for further delineation here.

4. The Third and Ninth Circuits are in conflict in their interpretation of Congressional intent regarding the statute at issue here. The Third Circuit's attempt to reconcile divergent judicial philosophies by a footnote (Appendix 22a-23a, n. 17) is superficial in the extreme. The foot-

note accurately states that both decisions approve EPA action, but the *substance* of what was approved and the *principles* advanced are clearly in conflict.

5. It is time for this Court to sharply draw the line between areas of administrative expertise and those in which the courts are competent. There are parallel and conflicting lines of precedents "with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (Friendly, J.), *aff'd sub nom., Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). This Court should curtail rubberstamp deference where, as here, the questions presented are matters of statutory construction, not technical expertise, and where the issue is the statutory jurisdiction of the agency itself.

CONCLUSION

For the reasons stated in Point VI, and because of the errors below (Points I through V), Milltown urges that certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2906, 81-2907

CITY OF NEW BRUNSWICK,
Appellee

v.

BOROUGH OF MILLTOWN and the MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly Middlesex County Sewerage Authority),
Appellants

and

THE MIDDLESEX COUNTY UTILITIES AUTHORITY
(formerly the Middlesex County Sewerage Authority),
Appellant

v.

THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Action No. 80-4040)

Argued June 24, 1982

Before: GARTH, BECKER, *Circuit Judges*, and FULLAM, *District Judge**

(Opinion Filed July 22, 1982)

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*Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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Appendix A

OPINION OF THE COURT

GARTH, *Circuit Judge*.

In this appeal we are presented with two questions. The first is whether the Environmental Protection Agency ("EPA") acted within its authority in withholding federal grant funds from the Middlesex County Utilities Authority ("MCUA") on the ground that the Borough of Milltown, whose sewage is treated by the MCUA's plant at Sayreville, New Jersey, has not adopted a system of user charges as required by the Federal Water Pollution Control Act Amendments of 1972, as amended, 33 U.S.C. §§1251 *et seq.* ("the Clean Water Act"), and its implementing regulations, 40 C.F.R. §§35.900 *et seq.* The second issue is whether — assuming that the EPA's decision to withhold funds does fall within its authority — the Clean Water Act unconstitutionally impairs a contract which Milltown has with the neighboring City of New Brunswick, a participating member of the MCUA, under which New Brunswick is responsible for disposing of Milltown's sewage free of charge to Milltown. Because we agree with the district court's determination that the EPA is authorized to withhold funds from the MCUA in the circumstances of the present case, and that the provisions of the Clean Water Act authorizing such withholding are not inconsistent with the constitutional provisions regarding impairment of contracts, we will affirm the district court's judgment.

I.

The present dispute stems from a decision by the MCUA to apply to the EPA for federal funds to assist it in the expansion and improvement of a sewage treatment facility that the MCUA operates. This plant, located in Sayreville, New Jersey, receives sewage from approximately twenty-five municipalities in three New Jersey

counties, as well as from a number of industrial concerns. Currently, the MCUA is engaged in a construction project to install new lines and make other improvements which will allow the Sayreville plant to operate with less of an adverse impact on water quality.

To help defray the cost of these improvements, the MCUA applied to the EPA for federal grant funds pursuant to the Clean Water Act.[1] Title II of that Act, 33

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1. In addition to improving the plant at Sayreville, the MCUA, spurred on by an amendment to the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1412a, is drawing up plans for the possible construction of a "dewatering plant" which would enable the MCUA to end its practice of dumping sewage sludge into the ocean and allow it to dispose of the sludge on land instead. In its third-party complaint for relief against the EPA, the MCUA alleged that in addition to withholding funds for the Sayreville project, the EPA has "refused to award . . . grants in aid [of the dewatering project] because of the failure of the Borough of Milltown to adopt and enforce a sewer user charge ordinance." *See* Appendix at 40.

Claiming that the question of whether the MCUA will in fact have to cease ocean dumping is currently being litigated in several cases pending in various federal district courts, however, the EPA asserts that, because it is not clear that the MCUA will ever have to build the dewatering plant, the question of whether the EPA may withhold funds for that project is not at issue in the present case. Brief of EPA at 4 n.2. On the other hand, though, we note that the district court, apparently referring to the dewatering project, specifically found that "[f]or the same reason [that it has withheld funds for the Sayreville project], the EPA has also refused to approve applications by the MCUA for new grants." 519 F. Supp. at 881. *See also* affidavit of Sol Seid, ¶9, Appendix at 88. We also note that the Clean Water Act provides for grants not only for actual construction, but also for planning and design, *see generally* Bosco v. Beck, 475 F. Supp. 1029, 1031 (D.N.J. 1979), *aff'd without opinion*, 614 F.2d 769 (3d Cir.), *cert. denied*, 449 U.S. 822 (1980), so that refusal to approve grant funds could cause harm to the MCUA by "imped[ing] [it] in its progress towards a land-based alternative for the disposal of sewage sludge," Third Party Complaint of MCUA, Appendix at 22.

In any event, it makes little difference whether we consider the funds for the dewatering project to be technically "at issue" in the present case, for the EPA's actions with respect to the Sayreville im-

U.S.C. §§1281-1297, establishes a federal grant program under which the federal government will bear up to 75 percent of the construction cost of publicly-owned waste treatment plants, so long as certain conditions are met by the grantee. *See generally Bosco v. Beck*, 475 F. Supp. 1029, 1031 (D.N.J. 1979), *aff'd without opinion*, 614 F.2d 769 (3d Cir.), *cert. denied*, 449 U.S. 822 (1980). On August 30, 1976, the EPA approved the MCUA's application, on the condition, among others, that the MCUA comply with the "user charge" provisions of the Clean Water Act.

Under the user charge provisions of the Act, the EPA administrator is not to approve a grant

> unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant * * *.

33 U.S.C. §1284(b)(1) (Supp. 1982) (hereinafter referred to as "section 204(b)(1)"). The EPA regulations specify what requirements a user charge system must meet in order to satisfy section 204(b)(1). In general, the user charge system proposed by a grantee such as the MCUA must, in order to meet approval, ensure that "each user . . . pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste

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provements and the dewatering project raise precisely the same question: whether the EPA may withhold Clean Water Act grant funds from the MCUA because Milltown has not adopted a user charge system.

water loading from all users . . . ." 40 C.F.R. §35.929-1(a).[2] Moreover, in the case of a "regional treatment system accepting wastewaters from other municipalities," such as the MCUA, "the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1)(A) of the Act [quoted above] and §§35.929 through 35.929-3" of the regulations. *Id.* §35.929-2(e).

After making some payments to the MCUA pursuant to the grant agreement of August 30, 1976, the EPA determined that the MCUA was not complying fully with section 204(b)(1) of the Clean Water Act, or with the implementing regulations, as required by the terms of the grant agreement. The basis for this determination was the fact that the Borough of Milltown, whose sewage is treated by the MCUA at the Sayreville plant, has not adopted a user charge system.[3] The explanation for Milltown's

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2. As subsequently amended, §204(b)(1) does not require that the user charge system be based on actual sewage or water supply flow; where approval is given by the EPA Regional Administrator, the grantee may employ an ad valorem tax for residential and small non-residential users. *See* 33 U.S.C. §1284(b)(4) (Supp. 1982); 40 C.F.R. §35.929-1(b). The effect of these amendments on the present case is discussed in Part II.B., *infra*.

3. The district court also noted that

> [I]n an affidavit submitted by the government after oral argument, the EPA has suggested that the withholding of grant money from MCUA is not solely due to Milltown's failure to adopt a user charge system and that at least one other municipality has also failed to meet the requirement.

519 F. Supp. at 881 n.3. The MCUA objects to any reference to this other dispute, which is currently pending before this court in a separate appeal at No. 82-5116, on the ground that "the pleadings in this case do not raise an issue of default by any other participant in the system." Brief of MCUA at 15 n.*. We agree with the MCUA that the question of whether other municipalities whose sewage is treated by the Sayreville plant have complied with the user charge requirement is not before this court in the present case, and for that reason we do not take into account the alleged noncompliance of any recipient of the MCUA's services other than Milltown in determining whether the EPA is authorized to withhold funds for the Sayreville plant.

failure to adopt such a system is a contract that Milltown signed in 1914 with the City of New Brunswick, which, unlike Milltown, is a participating member of the MCUA and so pays the MCUA for sewage treatment. As the district court noted, it is undisputed that

> in 1914 the City of New Brunswick entered into a contract with the Borough of Milltown under which New Brunswick agreed to receive and dispose of Milltown's sewage without charge in exchange for Milltown's promise to discontinue its practice of discharging sewage into the Lawrence Brook, a source of drinking water for New Brunswick. On two separate occasions, New Jersey courts have upheld the validity of this contract. *City of New Brunswick v. Borough of Milltown*, 3 N.J. Super. 113, 65 A.2d 621 (App.Div. 1949); *City of New Brunswick v. Borough of Milltown*, 135 N.J.Eq. 310, 38 A.2d 288 (Ch. 1944).
>
> As a result of this contract, the sewage from Milltown flows free of charge from Milltown to New Brunswick, and the combined flows from the two municipalities are treated at the MCUA plant. New Brunswick pays MCUA for its own and for Milltown's sewage at a rate set by the MCUA. Milltown pays nothing to New Brunswick or to MCUA and has not, to date, adopted a system of sewer user charges to pay for its proportionate share of waste treatment.

City of New Brunswick v. Borough of Milltown, 519 F. Supp. 878, 881 (D.N.J. 1981).

As a consequence of its determination that the MCUA was not in full compliance with the user charge requirement because Milltown, "a recipient of waste treatment services within the [MCUA's] jurisdiction," had not adopted a user charge system, the EPA began to

withhold funds for the Sayreville project.[4] It is that determination which is attacked by Milltown and the MCUA in the present case.

The legal challenge to the EPA's decision to withhold funds for the Sayreville project was brought into federal district court by a rather involved sequence of procedures and actions:

> [I]n August, 1980 . . . the City of New Brunswick instituted suit in the Superior Court of New Jersey, Chancery Division, Middlesex County, against Milltown and the MCUA, seeking an injunction and declaration that a 1914 contract between itself and Milltown, which obligates New Brunswick to receive and dispose of Milltown's sewage without cost, was void on several grounds, including allegations based on EPA regulations:
>
> > Federal Rules and Regulations governing the Middlesex County Sewerage Authority must be made applicable to all users of the system, including the Defendant, Borough of Milltown, regardless of whether or not the user has a direct contract with the Sewerage Authority.
> >
> > Complaint, ¶4, Third Count.
>
> New Brunswick further alleged:
>
> > [U]nder such Rules and Regulations such users of the Sewerage Authority's facilities must pay their fair share of the cost of operating and

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4. Under the applicable regulations, the EPA's Regional Administrator may not "pay more than 50 percent of the Federal share of any [construction project, such as the improvement and expansion of the Sayreville plant] . . . unless the grantee [the MCUA] has submitted adequate evidence of timely development of its system of user charges[,] nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system." 40 C.F.R. §35.935-13(a)(1).

maintaining the Sewerage Authority's treatment works.

Complaint, ¶5, Third Count.

In November, 1980, MCUA brought the Environmental Protection Agency into the state court litigation by naming it as a third-party defendant. In its cross-complaint, MCUA alleged that neither the Clean Water Act nor its implementing regulations requires that Milltown adopt a system of user charges and that, even if they did, such a requirement would constitute an unconstitutional abrogation of the 1914 contract. EPA removed this action to the Federal District Court under 28 U.S.C. §1442(a)(1) in December, 1980, and . . . answered and counterclaimed against all other parties, seeking a declaration that section 204 authorizes EPA to withhold grant funds from MCUA pending adoption of the user charges by Milltown and an injunction requiring Milltown to adopt such user charges or alternatively, to cease sending its sewage through MCUA's facility for treatment.

City of New Brunswick v. Borough of Milltown, 519 F. Supp. at 880-81 (footnote omitted).

All parties then moved for partial summary judgment on the federal issues presented by the litigation. In an order of September 9, 1981, the district court essentially ruled in favor of the EPA on the federal questions. In its accompanying opinion of August 11, 1981, the district court first held that under section 204(b)(1) Milltown is a "recipient" of waste treatment services from the MCUA, According "great deference" to the EPA's interpretation of the Clean Water Act, the district court held that "[t]he fact that Milltown itself does not directly place its own waste into the MCUA system or require that waste water be treated by the MCUA is not material"; Milltown's sewage is in fact treated by the

MCUA, and so Milltown is a "recipient" of the MCUA's services. 519 F. Supp. at 882.

Such an interpretation of the statute, the district court reasoned, would fulfill what it found to be the twofold purpose of the user charge requirement of the Clean Water Act. By requiring that every recipient of waste treatment services pay its proportionate share of the treatment costs, section 204(b)(1) ensures that every facility built with federal financial assistance will be economically self-sufficient in its operations; moreover, the imposition of user charges provides an incentive to discourage excessive use of the sewage treatment system. In the present case, the district court held, the EPA's determination that adoption of a user charge system by Milltown should be a prerequisite to continued funding of the Sayreville improvements is consistent with those purposes:

> Unless Milltown adopts its own system of user charges there is simply no incentive on individual or industrial users within Milltown to decrease their water consumption and thereby decrease discharges in the MCUA facility. Moreover, should New Brunswick break its contract with Milltown and cease paying for the costs of treating Milltown's wastes, MCUA would, in the absence of a user charge system in Milltown, be faced with a revenue shortfall.

519 F. Supp. at 883.

Having held that the EPA's withholding of funds falls within the scope of the statute and the regulations, the district court turned to the question whether "the [Clean Water] Act so interpreted unlawfully impairs Milltown's contract with New Brunswick or is otherwise invalid or contrary to public policy." 519 F. Supp. at 883.[5] Reasoning that "the [federal] government does

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5. The district court correctly observed that while the Contract Clause, Article I, Section 10, Clause 1 ("No State shall . . . pass any

have the right to impair existing contractual obligations if the contemplated action is reasonably necessary to further a legitimate public purpose," the district court held that Congress has a legitimate interest in protecting the quality of the environment, and that the means chosen to further that end — the conditioning of federal grant money on compliance with terms designed to promote the improvement of the environment — were reasonably related to that end. This was so, the district court held, especially considering that the Clean Water Act is not an "automatic abrogation of all contracts involving charges for sewage treatment." *Id.* at 884. *See also United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977). As far as the "public policy" objections to the EPA's withholding of funds are concerned, the district court rejected the argument that MCUA is being "punished" for something beyond its control:[6] "MCUA is under no obligation to apply for grant funds from EPA." *Id.*[7]

Finally, having granted judgment in favor of the EPA and New Brunswick on the federal claims, the district court held that the remaining issues should be resolved by the state courts. Thus, rather than order Milltown either to adopt a user charge system or to cease sending its sewage to the MCUA's plant (as the EPA and

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. . . Law impairing the Obligation of Contracts . . ."), does not apply to the federal government, the fifth amendment's prohibition of the deprivation of property without due process places constraints on the federal government with respect to contract impairment that are similar to those placed on the states by the contract clause. 519 F. Supp. at 878; *see* Lynch v. United States, 292 U.S. 571 (1934). *See generally* L. Tribe, American Constitutional Law, §9-5, at 465 n.1 (1978). For ease of reference, therefore, we will refer to both constraints under the rubric of the "contract clause."

6. The MCUA also argued that the Clean Water Act in effect required it to commit tortious interference with the contract between Milltown and New Brunswick. 519 F. Supp. at 885.

7. MCUA also raised an estoppel argument before the district court which it has not raised on appeal. *See id.* at 885-86. Thus that issue is not before us.

New Brunswick had requested the court to do), the district court remanded the case to the state courts for determination of whether, in light of the "dramatic change in circumstances" occasioned by the passage of the Clean Water Act, the Milltown-New Brunswick contract still has binding force. *Id.* at 886.[8] Both the MCUA and Milltown then filed timely notices of appeal.

II.

In considering the arguments of Milltown and the MCUA that the EPA's decision to withhold funds is unauthorized by the Clean Water Act, we are guided by the Supreme Court's repeated admonitions that "when faced with a problem of statutory construction," the courts should show "great deference to the interpreta-

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8. Neither the EPA nor New Brunswick has taken an appeal from the district court's order of September 9, 1981. Thus they do not contest the portion of the district court's order remanding the case to the state courts for a determination of the validity of the Milltown-New Brunswick contract. *See* Order of September 8, 1981, ¶¶ 2 and 3. Moreover, while Milltown has taken an appeal from the district court's order, it does not contest that order insofar as it remands the case to state court for determination of the remaining state law issues. *See* Brief of Milltown at 26; Appendix at 105.

The MCUA's position with respect to remand is slightly less clear, but it does not appear that the MCUA contests the remand on appeal. In its "Amended Notice of Appeal," the MCUA did list the remand order as one of the issues it would contest on appeal. Appendix at 132. On the other hand, in its motion for summary judgment before the district court — the district court's disposition of which is now before this court on appeal — the MCUA limited itself to the federal issue of the EPA's authority to withhold funds based on Milltown's failure to adopt a user charge system. More important, in its opening brief and reply brief before this court, the MCUA has not made any mention of the remand, and accordingly appears to have decided not to contest the remand.

In view of the parties' positions with respect to this aspect of the district court's order, we have no occasion to address the issue of remand.

tion given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83-84 (1981). Thus, so long as the interpretation of the Clean Water Act propounded by the EPA "is reasonable and is consistent with the language and purpose of the legislation," *Chrysler Corp. v. EPA*, 631 F.2d 865, 884 (D.C. Cir.), *cert. denied*, 449 U.S. 1021 (1980), we will defer to that interpretation. *See American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1041 (3d Cir. 1975), *modified on other grounds*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). In the present case, we agree with the district court that Milltown and the MCUA have failed to produce the "weighty reasons," *Brewster v. Gage*, 280 U.S. 327, 336 (1930), that would be needed to persuade us to set aside the EPA's interpretation of the Clean Water Act.

A.

Appellants' first contention is that the language of the Clean Water Act and the implementing regulations do not support the EPA's position that funds can be withheld from the MCUA based on Milltown's failure to adopt a user charge system. In support of this contention, appellants offer three arguments. First, Milltown argues that it cannot be deemed to be a "recipient" of the MCUA's waste treatment services within the meaning of section 204(b)(1). "Once the sewage crosses into New Brunswick," Milltown argues, "the sewage belongs to New Brunswick," not Milltown; thus it is New Brunswick, not Milltown, that "receives" services from the MCUA. *See* Brief of Milltown at 11-12. We think, however, that the district court was entirely correct in rejecting this argument: sewage generated in Milltown is in fact treated at the MCUA's Sayreville plant, and therefore the EPA is no way inconsistent with the language of the statute in considering Milltown a "recipient," albeit an indirect one, of the MCUA's treatment services.

Second, both the MCUA and Milltown argue that even if Milltown can in this general sense be deemed a "recipient" of the MCUA's waste treatment services, section 204(b)(1) contains a plain and explicit limitation on the scope of the term "recipient": only those recipients who are "within the applicant's [MCUA's] jurisdiction" can be required to adopt a user charge system.[9] Milltown, the appellants argue, is not within the MCUA's "jurisdiction," for under state law the MCUA has no legal power to direct Milltown to do anything.[10] The EPA replies that the phrase "within the applicant's jurisdiction" does not refer to legal power, but rather simply means "within the territory served by the sewage treatment plant." *See* 40 C.F.R. §35.929-1(a) (referring to users "within the grantee's service area"). The territory served by the Sayreville plant, of course, includes Milltown.

Like the term "recipient," the word "jurisdiction" is not defined in the statute. Nor, in our view, is there any clear legislative history indicating precisely what the phrase "within the applicant's jurisdiction" was intended to mean.[11] The EPA's interpretation, however, is cer-

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9. As noted earlier, §204(b)(1) requires that "each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, . . . pay its proportionate share . . . of the costs of operation and maintenance . . . of any waste treatment services provided by the applicant." 33 U.S.C. §1284(b)(1).

10. As the MCUA puts it, the user must be "legally subject to the legislative and enforcement 'jurisdiction' of the 'applicant' for a grant." Brief of MCUA at 17.

11. The EPA points to statements in the legislative history of the Clean Water Act, such as the comment in the Senate Report that "[a]s a general rule, the volume and character of each discharge into a publicly owned system should form the basis of determining the rate at which each user should be required to pay." S. Rep. No. 414, 92d Cong., 1st Sess. 28 (1971), *reprinted in* Staff of Senate Comm. on Public Works, 92d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 at 1446 (Comm. Print 1973), *and in* 1972 U.S. Code Cong. & Ad. News 3668, 3695 [hereinafter "S. Rep. No. 414"]. In our view, how-

tainly a plausible one; and considering that section 204(b)(1) speaks of the "applicant's jurisdiction, *as determined by the Administrator*," we will not set aside the agency's interpretation simply because appellants offer another plausible interpretation. *Cf. Chrysler Corp. v. EPA*, 631 F.2d at 885 (refusing to set aside plausible and reasonable interpretation of Clean Air Act by EPA simply because party offers an alternative plausible interpretation).

Finally, Milltown argues that the language of the EPA's own regulations clearly indicates that the "EPA itself . . . did not intend to override an agreement such as that between Milltown and New Brunswick." Brief of Milltown at 24. Milltown points to 40 C.F.R. §35.929-2(g), which provides in part that "[t]he user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users . . . which are inconsistent with the requirements of section 204(b)(1)(A) of the [Clean Water] Act and these regulations." This regulation, Milltown argues, "was only intended to supersede inconsistent contracts to which the grantee (here MCUA) is a party, not contracts (such as that between Milltown and New Brunswick) to which the grantee is not a party." Brief of Milltown at 24. We are not presented here, though, with a case in which the basis for a determination of a failure to comply with section 204's requirements is a "contract between a grantee and a user." Thus for the very reason that Milltown's interpretation of section 35.929-2(g) appears correct, that particular regulation is simply irrelevant to the present case: the EPA is not basing its withholding of funds on any contract between the MCUA and Milltown.

In attempting to counter Milltown's argument con-

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ever, these general statements shed no more light on the meaning of the particular phrase, "within the applicant's jurisdiction," than does, for example, the language of 40 C.F.R. §35.929-1(a).

cerning the regulations, the EPA relies on 40 C.F.R. §35.929-2(e), which provides:

> If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1)(A) of the Act and §§35.929 through 35.929-3. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of *all municipalities contributing wastes to the treatment works.*

It is possible that the underscored passage in this regulation was intended to require municipalities such as Milltown, whose sewage is treated by the grantee but who have no direct relationship with the grantee as a subscriber, to adopt user charge systems. On the other hand, it is also possible that the underscored passage simply refers to the *implementation* of a user charge system by the municipal subscribers to a regional waste treatment facility. Were the regulations more lucid, this section might well provide an alternative ground for our decision. Given its lack of clarity, however, our decision that Milltown is a recipient rests not on 40 C.F.R. §35.929-2(e), but on the plain meaning of the statute, its intended goals, and the agency's interpretation of its mandate.[12]

B.

Appellants' second contention concerning the proper interpretation of the Clean Water Act is that even if

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12. We note that we do not today hold that Milltown must become a "subscriber" to the MCUA facility as a condition of the MCUA's grant. The only requirement imposed by our decision to uphold the EPA's action is that, so long as the MCUA receives federal funding and continues to treat Milltown's sewage, Milltown must adopt a system of user charges.

the statutory language itself does not compel adoption of their reading of the Act, an analysis of the purposes of the Act clearly indicates that Congress' intent was such that the MCUA's eligibility for grant funds should in no way be jeopardized by the fact that Milltown has not adopted a user charge system. More specifically, the MCUA argues that the Clean Water Act, interpreted in light of its purposes, does not give the EPA the authority to withhold funds from a grantee because a relatively insignificant user with no direct relationship to the grantee fails to adopt a user charge system, Brief of MCUA at 19-39, and, alternatively, that even if the statute does give the EPA such authority, the agency's exercise of that authority constitutes an abuse of discretion on the particular facts of this case, *id.* at 39-43. The MCUA advances the same arguments in support of its abuse of discretion claim as it does for its claims concerning the proper interpretation of the statute, however, and we will consider the two claims together.

According to appellants, a literal or strict reading of the Clean Water Act, by which every municipality whose sewage is treated by the MCUA is considered to be a "recipient" of its services and so obligated to institute a system of user charges as a condition of the Sayreville project grant, contravenes, or at the very least does nothing to further, three important policies embodied in the Clean Water Act. The first policy is the congressional determination that because the massive job of cleaning up the nation's waters cannot be completed without generous federal financial assistance, Clean Water Act grants should not be denied on the basis of trivial matters over which the grantee has no control. The second policy is that of flexibility in adapting the grant requirements to "allow for such special and local variations in the legal and financial circumstances of a particular public grantee as those presented in the instant case." Brief of MCUA at 33. The third policy is that of ensuring that each federally-assisted waste disposal plant is efficient

and economically self-sufficient in its operations. We consider the impact of each of these three policies in turn.

(1)

With respect to the first policy, the MCUA argues that in passing the Clean Water Act Congress made it clear that it believed that state and local governments could not reach the desired water quality standards without significant amounts of federal financial assistance. Section 101 of the Act, 33 U.S.C. §1251, for example, states in part that "[i]t is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." Similarly, the Senate Committee on Public Works emphasized that in tackling the "massive" job of "cleaning up polluted waterways . . . States and local governments can go forward only when there is strong assurance that federal funds be available when needed." S. Rep. No. 414 at 35.[13] In the present case, the MCUA argues that because of mandatory federal water pollution standards, it has no choice but to improve its Sayreville facility, a project for which federal grant money is extremely important. Moreover, the MCUA asserts, Milltown's contribution to the sewage flow at Sayreville is practically insignificant. In withholding funds, then, the EPA — for a trivial reason beyond the MCUA's control — has frustrated the clear congressional policy to ensure through federal funding that local governments improve the quality of their waste disposal facilities; such a "narrow and niggardly approach," the MCUA concludes, Brief of MCUA at 25, cannot have been intended by Congress in enacting section 204(b)(1).

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13. *See also* Train v. City of New York, 420 U.S. 35, 45 n.10 (1975) (referring to necessity of federal financial aid "to finance the construction of waste treatment facilities which will meet the standards imposed by" the Clean Water Act).

It is indisputable, of course, that the Clean Water Act evinces a clear congressional determination that the clean-up of the nation's waters is an important aim, one which requires large amounts of federal financial assistance to state and local governments. It is equally indisputable, though, that Congress placed a number of mandatory conditions on the receipt of such assistance. Indeed Title II is replete with conditions on the grant of aid to sewage construction works, conditions which, in the words of the Senate Report, are intended "to assure that such works are constructed and finally operated and maintained in a manner which will produce the best practicable application of treatment technology." S. Rep. No. 114 at 27.[14] Unless these conditions are meaningless, the EPA must have the power to cut off funds to nonconforming projects, even when the local public body demonstrates a strong need for the grant money. To hold otherwise would be to conclude that Congress vested authority in the EPA to deny funds only to those projects for which the grant money is not particularly important. Such an interpretation, however, would render the conditions on the grant of federal assistance practically meaningless. Thus, even assuming without deciding that the withholding of funds would indeed seriously burden the MCUA, it certainly could not be contended that that fact alone would justify overturning the EPA's decision to withhold funds for the Sayreville project.

The MCUA, however, does not rely solely on the fact of its need for the funds; it also repeatedly asserts that Milltown's noncompliance is a trivial matter. In its

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14. The user charge requirement, moreover, fully satisfies the rule that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24 (1981). Thus we fail to see how *Pennhurst* in any way undermines the EPA's position, as Milltown asserts.

brief before this court, the MCUA asserts that Milltown's sewage constitutes only one percent of the average daily gallonage flow at the Sayreville plant, and that the estimated cost of treating Milltown's sewage is only 4.7 percent of the total cost of treating the combined Milltown-New Brunswick sewage flow. Brief of MCUA at 12-13. Thus, the MCUA claims, even assuming that Congress did contemplate that an applicant for Clean Water Act funds would be turned down if it failed to comply with the Act's conditions in some important respect — no matter how great its need for federal assistance — Congress never intended to give the EPA the authority to withhold funds when such an applicant has demonstrated "substantial effectuation of a user charge requirement." Brief of MCUA at 34.

We decline the MCUA's invitation to second-guess the EPA's determination that Milltown's complete failure to adopt any user charge system at all is more than an inconsequential matter. To begin with, the district court made no finding of fact that Milltown's contribution to the sewage flow at the Sayreville plant is *de minimis*.[15] More important, we believe that the determination whether a deviation from the conditions of the Act is important enough to warrant a denial of federal funds is a matter primarily for the EPA and not the courts. We can overturn the EPA's decision to withhold funds from the MCUA's plant at Sayreville only if that decision is arbitrary and capricious. *See Hotel Employers Association v. Gorsuch*, 669 F.2d 1305, 1307 (9th Cir. 1982). In the present case, the EPA has taken the position that while there is flexibility in designing the user

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15. For obvious reasons, moreover, we cannot accept the MCUA's argument that the amount of sewage flowing from Milltown into the Sayreville plant is a "legislative fact," or a fact of which we can take "judicial notice." The doctrines of "legislative facts" and "judicial notice" are not talismans by which gaps in a litigant's evidentiary presentation before the district court may be repaired on appeal.

charge system, an outright refusal by one of the users to adopt any user charge system at all is, in itself, a sufficient basis for concluding that the applicant has failed to meet section 204's mandatory requirement that "*each recipient* of waste treatment services . . . *will pay* its proportionate share . . . of the costs . . . of any waste treatment services provided by the applicant." 33 U.S.C. §1284(b)(1) (emphasis supplied). Such a determination, in our view, hardly qualifies as a "clear error of judgment," *Hotel Employers Ass'n*, 669 F.2d at 1307, and so we will not disturb the EPA's determination that Milltown's failure to adopt a user charge system is more than the trivial matter that the MCUA pictures it to be.

(2)

For similar reasons, we find unpersuasive the appellants' arguments concerning the flexibility that Congress intended the EPA to show in administering the Clean Water Act grant program. Both the MCUA and Milltown place heavy reliance on the Senate Report accompanying the Clean Water Act, which states:

> Although the committee is aware of the many different legal and financial circumstances that characterize state and local governments and agencies throughout the country, the bill directs the Administrator to promulgate guidelines for the establishment and imposition of user charge systems as a guide to grant applicants for waste treatment works grants. *These guidelines should take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction*, and each applicant should be permitted reasonable flexibility in the design of a system of user charges that meets the unique requirements of his own jurisdiction. As a general rule, the volume and character of each discharge into a publicly owned system should form

> the basis of determining the rate at which each user should be required to pay.

S. Rep. No. 414, at 28 (emphasis supplied).[16] According to appellants, the 1914 New Brunswick-Milltown contract is one of those unique "legal and financial circumstances" to which the Senate Report refers. In essence, appellants argue that taking into account the special circumstances created by the Milltown-New Brunswick contract, the MCUA has adopted a "system of user charges" in requiring that every user with whom it has a direct relationship and over whom it can thus exercise some control institute a system of user charges.

The EPA, however, takes the position that the flexibility which Congress envisioned relates not to whether a particular user must adopt a user charge system at all, *see* 40 C.F.R. §35.929-1(a) ("*each user* . . . [must] pay[] its proportionate share"), but rather to the precise form that the user charge system takes. Significantly, the Senate Report speaks not of "flexibility" in general, but of "flexibility *in the design of a system of user charges.*" We see no reason to conclude that the congressional policy of flexibility necessarily extends to the very question of whether a particular recipient of treatment services will adopt a user charge system in the first place.[17]

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16. *See also* 33 U.S.C. §1251(b) ("It is the policy of Congress that the States manage the construction grant program . . ."); Senate Debate on S. 2770, November 2, 1971, *reprinted in* Staff of Senate Comm. on Public Works, 92d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 at 1353 (remarks of Senator Muskie) ("the flexibility point is emphasized, and I think should be, because we are trying to encourage experiments and flexibility").

17. In Garden State Paper Co. v. County Sanitation District No. 21, Civil No. 78-0042-IH (C.D. Cal. February 6, 1980) (unreported bench opinion), a sanitation district which had applied for and received Clean Water Act grants for a sewage project sought to abrogate a contract which it had with one user, on the ground that the contract did not incorporate a user charge system. *See* 40 C.F.R. §35.929-2(g) ("The user charge system shall take prece-

(3)

Finally, appellants object to the district court's holding that requiring Milltown to adopt a system of user charges as a condition of the grant would serve the dual purposes of section 204(b)(1), which are to ensure that federally-assisted facilities become economically self-sufficient in their operations, and to promote water con-

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dence over any terms or conditions of agreements or contracts between the grantee and users . . . "). The district court held, among other things, that that regulation was invalid:

> [T]he [Clean Water Act] does not require that a system of charges which otherwise meets its criteria should also provide for the abrogation of an existing contract and does not authorize a regulation which would so require. . . . [T]he performance of a preexisting contract, otherwise valid, for the length of its term, is not a violation of the statute so long as the rate system adopted by the applicant and in effect requires of all other users their proportionate share of costs.

Similarly, the MCUA argues, the Clean Water Act should not be read as requiring the abrogation of a pre-existing contract between two users such as Milltown and New Brunswick, so long as the grantee has adopted a system of user charges for all other users.

The *Garden State* court, however, pointed to no authority in support of its reading of the Clean Water Act; nor are we aware of any. Rather, the *Garden State* court was influenced by its premise that if the regulation were held to be valid, the statute would violate the constitutional prohibition against the impairment of contracts. We reject that premise, *see* Part III, *infra*, and we reject the argument that the congressional policy of flexibility excuses the MCUA from effectuating full compliance with §204(b)(1).

Appellants also rely upon Hotel Employers Ass'n v. Gorsuch, 669 F.2d 1305 (9th Cir. 1982), in support of their "flexibility" argument. *Hotel Employers* involved a challenge to the EPA's approval of a particular form of user charge system, a challenge which the court rejected on the ground that the EPA's interpretation of §204(b)(1) had a "rational basis." In our view *Hotel Employers* stands for the proposition that the courts will defer to the EPA's exercise of the flexibility that it undoubtedly has in administering the Clean Water Act grants, and will not substitute their own judgment for the EPA's. Thus we read *Hotel Employers* as entirely consistent with our holding in the present case.

servation by discouraging excessive user of the sewage system. 519 F. Supp. at 883, 885. According to appellants, the aim of financial self-sufficiency is fully assured even without adoption of a user charge system by Milltown; because New Brunswick pays for treatment of Milltown's sewage out of user charges imposed on businesses and residences within New Brunswick, there is no danger that the MCUA will suffer a shortfall in revenues. As the district court pointed out, however, should New Brunswick ever abrogate its contract and cease paying for the treatment of Milltown's sewage, the MCUA would indeed be faced with a revenue shortfall. 519 F. Supp. at 883.[18]

Moreover, it is clear that one of the purposes of section 204's user charge requirement is to promote water conservation. *See* S. Rep. No. 217, 95th Cong. 2d Sess. 27, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4352 ("A charge to the 'consumer' based on cost of treatment would be a positive force in encouraging more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use.").[19] Although Congress in 1977

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18. Relying on the fact that the New Brunswick-Milltown contract is still binding as a matter of state law, appellants discount the concern that New Brunswick might breach the contract as a makeweight. We see no reason, however, to discount the possibility that — whether through choice, judicial decision, or financial inability — New Brunswick might someday cease paying for treatment of Milltown's sewage, regardless of whether the contract is still in effect. And such an action would leave the MCUA open to precisely the kind of revenue shortfall that all the parties agree the statute was intended to avoid. *See* S. Rep. No. 114 at 28.

19. Appellants object to any reliance on the legislative history to the 1977 amendments to the Clean Water Act. In this case, however, water conservation is an obvious if unstated goal of the 1972 Act, as evidenced by the Comptroller General's decision in 1974 that section 204(b)(1) did not permit ad valorem taxes because such taxes would not promote the purpose of water conservation served by user charges. 54 Comp. Gen. 1, 5 (1974). When Congress amended section 204 to permit ad valorem taxes as an alternative to user

amended the Clean Water Act to allow charges to be based on ad valorem taxes or flat fees in certain cases rather than on direct measures of sewage flows such as metering, *see* 33 U.S.C. §1284(b)(4) (Supp. 1982),[20] we cannot agree with appellants that in so doing Congress "eviscerated" any conservation purpose to the user charge requirement. On the contrary, conservation of water is heavily stressed in the legislative history to the 1977 amendments to the Clean Water Act. *See, e.g.*, 1977 U.S. Code Cong. & Ad. News at 4351. In our view, the 1977 amendments were intended simply to provide "greater flexibility . . . for the assessment of user charges," *id.* at 4352, and not to undermine the user charge concept itself of its underlying purposes.

Accordingly, we reject the appellants' arguments that the EPA's decision to withhold funds in this case contravenes the underlying policies of the Clean Water Act or constitutes an abuse of discretion.

III.

Milltown's final contention is that if section 204(b)(1) does authorize the EPA's decision to withhold funds, that section unconstitutionally impairs the obligation of a contract.[21] The district court rejected this con-

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charges, it explicitly preserved the water conservation objective by requiring users to be notified of the portion of their bill attributable to the cost of water treatment. A Legislative History of the Clean Water Act of 1977, 95th Cong., 2d Sess. (Comm. Print 1978), at 439 (statement of Senator Muskie, who also was manager of the 1972 bill). Under the circumstances the 1977 legislative history merely acknowledges the water conservation goal already implicit in the Act. *Cf.* North Haven Board of Education, 102 S. Ct. 1912, 1925 (1982).

20. An ad valorem tax system is one based on property values; a flat fee charge is one assessed "per household or per plumbing fixture (such a sink or toilet)." *See generally* 40 C.F.R. §35.929-1(b); 1977 U.S. Code Cong. & Ad. News at 4351.

21. Though both the MCUA and Milltown pressed this argument before the district court, only Milltown now raises the constitutional objection to §204.

stitutional challenge, holding that section 204's user charge requirement is reasonably necessary to accomplish a legitimate congressional purpose. 519 F. Supp. at 883-85. In so holding, the district court apparently assumed that section 204(b)(1) does impair the obligation of the New Brunswick-Milltown contract, but determined that such impairment did not run afoul of the constitutional strictures on the contract impairment.[22] While we agree that section 204(b)(1) is constitutional, we do so on a different basis from that relied upon by the district court: in our view, section 204(b)(1) cannot be said to impair the New Brunswick-Milltown contract.[23]

The Clean Water Act provides for a grant of funds to the MCUA on the condition that the MCUA comply with certain requirements. Neither the statute itself nor the regulations contain any provision explicitly abrogating contracts such as that between Milltown and New Brunswick. Nor can it be said that section 204(b)(1) implicitly abrogates such contracts. In the present case, it is by no means clear that the EPA's withholding of funds from the MCUA on the basis of Milltown's failure to adopt a user charge system makes abrogation or impairment of the 1914 contract necessary or inevitable. First, the MCUA could forego funding under the Clean Water Act; nowhere in its pleadings or in its brief before this court has the MCUA alleged that completion of the

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22. The district court did note that the "MCUA is under no obligation to apply for grant funds from EPA," but it made that observation in the context of the MCUA's argument that the user charge requirement, as applied to the present case, amounted to "punishing" the MCUA for something over which it had no control. In analyzing the contract clause question, on the other hand, the district court appears to have assumed that §204(b)(1) did cause an "impairment" of the New Brunswick-Milltown contract for purposes of the contract impairment clause, and then reached the merits of the question whether such an impairment was constitutionally valid. *See* 519 F. Supp. at 883-85.

23. Thus, we neither approve nor disapprove the district court's analysis on the merits of the contract clause issue.

Sayreville project or, for that matter, construction of the dewatering plant, would be impossible without federal funds. Rather, the MCUA has argued that a loss of federal funds will seriously burden it, will cause large and unanticipated increases in expenses to the municipalities participating in the MCUA, and so on. Second, while the MCUA has no control over Milltown, it could simply refuse to accept New Brunswick's sewage, and so qualify for federal funds (at least insofar as the EPA's objections to Milltown's failure to adopt a user charge system are concerned). Neither contingency is necessarily incompatible with New Brunswick's retaining responsibility for Milltown's sewage, as called for in the 1914 contract.

To be sure, neither course of action — foregoing federal funds or refusing to accept the New Brunswick-Milltown sewage — would likely be very palatable to the MCUA, Milltown, or New Brunswick as a financial matter, and both alternatives might make it significantly more difficult for the parties to comply with mandatory federal water quality standards. In that sense, it cannot be denied that the EPA's decision to withhold funds makes abrogation of the Milltown-New Brunswick contract a more attractive alternative than it might otherwise be. That fact alone, however, cannot constitute a sufficient basis for deeming section 204(b)(1) to impair the obligation of a contract, for "to hold that motive or temptation is equivalent to coercion [would be] to plunge the law in endless difficulties." *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

The reason why "temptation" cannot be deemed equivalent to "coercion" — that is, to contract impairment — is not hard to discern. As a general rule, it is clear that "Congress may fix the terms on which it shall disburse federal money to the States." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *see King v. Smith*, 392 U.S. 309, 333 n.34 (1968). More-

over, while that power is not without limits, *see* 451 U.S. at 17 n.13, it is indisputable that the power to fix terms lies essentially with the Congress, and not with the federal courts. Yet because a great many if not all conditions on federal grants might very well have an impact on pre-existing contractual arrangements, to hold that every condition of a federal grant program that possibly enhances the likelihood that a contract will be breached is an "impairment of contract" in the constitutional sense, would be tantamount to ruling that virtually every federal funding statute is subject to the heightened judicial scrutiny that is invoked whenever the contract clause is implicated. As a result, no condition in a federal grant program could be upheld unless it was demonstrated to the satisfaction of the courts that the condition represented the only way to achieve an important state purpose. *See generally Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). To adopt such an approach would be drastically to undercut Congress' broad discretion to set such terms on federal funding programs as it deems appropriate, and, in consequence to give to the courts extensive power over the conditions that may be attached to the disbursement of federal money. We know of nothing in the constitution that compels such a result.

Accordingly, we decline to give the contract clause the expansive scope that Milltown urges upon us. As a matter of state law, the obligations of the 1914 contract remain untouched by the district court's decision; the user charge requirement of section 204(b)(1) and the applicable regulations do not by their terms purport to abrogate the Milltown-New Brunswick contract, nor do they inevitably require such impairment. In our view, that fact alone is a sufficient basis for rejecting Milltown's constitutional challenge to section 204(b)(1).

Appendix A

IV.

For the reasons expressed in this opinion, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

(Filed—August, 13, 1982)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2906/7

CITY OF NEW BRUNSWICK,

vs.

BOROUGH OF MILLTOWN and the MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly Middlesex County Sewerage Authority),

Defendants,

and

THE MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly the Middlesex County Sewerage Authority),

Defendant-Third Party Plaintiff,

vs.

THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Third Party Defendant.

Appendix B

Borough of Milltown,

Appellant in No. 81-2906,

Middlesex County Utilities Authority ("MCUA"),

Appellant in No. 81-2907.

(D.C. Civil No. 80-4040)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GARTH and BECKER, *Circuit Judges*; and FULLAM, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 24, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 10, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

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* Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix B

Certified as a true copy and issued
in lieu of a formal mandate on
August 13, 1982

ATTEST:

SALLY MAVOS
Clerk

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

July 22, 1982

APPENDIX C

Opinion of the United States District Court for the District of New Jersey

(Filed—August 11, 1981)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 80-4040

CITY OF NEW BRUNSWICK,

Plaintiff,

v.

BOROUGH OF MILLTOWN and THE MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly MIDDLESEX COUNTY SEWERAGE AUTHORITY),

Defendants,

v.

THE MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly MIDDLESEX COUNTY SEWERAGE AUTHORITY),

Defendant-Third Party Plaintiff,

v.

THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Third Party Defendant.

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DEBEVOISE, *District Judge.*

Appearances:

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Appendix C

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and

By: Lee Dehihns, Esquire
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This case presents a challenge to the Environmental Protection Agency's (EPA) decision to withhold part of its grant funds from the Middlesex County Utilities Authority (MCUA) because the Borough of Milltown, whose waste water is treated by the MCUA, had failed to adopt a system of user charges to pay for its proportionate share of the MCUA facility as mandated by section 204(b)(1) of the Clean Water Act, 33 U.S.C. § 1284(b)(1). The legal challenge began in August, 1980 when the City of New Brunswick instituted suit in the Superior Court of New Jersey, Chancery Division, Middlesex County, against Milltown and the MUCA, seeking an injunction and declaration that a 1914 contract between itself and Milltown, which obligates New Brunswick to receive and dispose of Milltown's sewage without cost, was void on several grounds, including allegations based on EPA regulations:

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> Federal Rules and Regulations governing the Middlesex County Sewerage Authority must be made applicable to all users of the system, including the Defendant, Borough of Milltown, regardless of whether or not the user has a direct contract with the Sewerage Authority.
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> Complaint, ¶ 4, Third Count.

New Brunswick further alleged:

> [U]nder such Rules and Regulations such users of the Sewerage Authority's facilities must pay their fair share of the cost of operating and maintaining the Sewerage Authority's treatment works.
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> Complaint, ¶ 5, Third Count.

In November, 1980, MCUA brought the Environmental Protection Agency into the state court litigation by naming it as a third-party defendant. In its cross-complaint, MCUA alleged that neither the Clean Water Act nor its implementing regulations requires that Milltown adopt a system of user charges and that, even if they did, such a requirement would constitute an unconstitutional abrogation of the 1914 contract. EPA removed this action to the Federal District Court under 28 U.S.C. § 1442(a)(1)[1] in December, 1980, and has answered and counterclaimed against all other parties, seeking a declaration that section

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[1] 28 U.S.C. § 1442(a)(1) permits removal of a civil action commenced in a state court against "any officer of the United States or agency thereof" to the United States District Court. For a general discussion of the power of the federal government to have actions brought against its officers or agencies removed to the federal forum under this statute *see Willingham* v. *Morgan*, 395 U.S. 402 (1969).

204 authorizes EPA to withhold grant funds from MCUA pending adoption of the user charges by Milltown and an injunction requiring Milltown to adopt such user charges or, alternatively, to cease sending its sewage through MCUA's facility for treatment.

All parties now move for partial summary judgment with respect to the federal issues presented in this litigation: Whether section 204(b)(1) of the Clean Water Act, 33 U.S.C. § 1284(b)(1), and its implementing regulations, 40 C.F.R. § 35.900, *et seq.*, authorize EPA to withhold grant funds from MCUA prior to the adoption of sewer user charges by Milltown, and whether the enforcement of a user charge system would cause an unconstitutional impairment of Milltown's contract with New Brunswick in violation of the Fifth Amendment?

There is no dispute concerning the material facts in this case. As already mentioned, in 1914 the City of New Brunswick entered into a contract with the Borough of Milltown under which New Brunswick agreed to receive and dispose of Milltown's sewage without charge in exchange for Milltown's promise to discontinue its practice of discharging sewage into the Lawrence Brook, a source of drinking water for New Brunswick. On two separate occasions, New Jersey courts have upheld the validity of this contract. *City of New Brunswick* v. *Borough of Milltown*, 3 N.J. Super. 133 (App. Div. 1949); *City of New Brunswick* v. *Borough of Milltown*, 135 N.J. Eq. 310 (Ch. 1944).

As a result of this contract, the sewage from Milltown flows free of charge from Milltown to New Brunswick, and the combined flows from the two municipalities are treated at the MCUA plant. New Brunswick pays MCUA for its

own and for Milltown's sewage at a rate set by the MCUA. Milltown pays nothing to New Brunswick or to MCUA and has not, to date, adopted a system of sewer user charges to pay for its proportionate share of waste treatment.

MCUA is currently expanding its Sayreville plant and is planning to build a sludge dewatering facility to aid its disposal of solid wastes on land which is mandated after December 31, 1981 by the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1401, *et seq.* To help defray the costs of its projects, the MCUA has applied for and been awarded various grants from the EPA. At present, payments under one outstanding grant agreement have been withheld because of MCUA's failure to meet the User Charge requirements.[2] This grant agreement, adopted on August 30, 1976, contains an express condition notifying MUCA that payments under the grant may be subject to withholdings in excess of 50% and/or 80% of the grant amount "for failure to comply with the requirements as to industrial cost recovery and user charge systems . . .". (*See* Exhibit B attached to the Supplemental Affidavit of Sol Seid.) For the same reason, the EPA

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[2] There is one other grant agreement between the MCUA and the EPA for which payments remain outstanding. That agreement, approved on January 16, 1973, contains no user charge system requirements since it was accepted before the user charge system was mandated by the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92-500) (*see* Exhibit A attached to the Supplemental Affidavit of Sol Seid). Consequently, no payments under this grant have been withheld because of Milltown's refusal to adopt a User Charge System. (*See* Affidavits of Edward Markus and Allan Jacobs.)

has also refused to approve applications by the MCUA for new grants.[3]

Defendants MCUA and Milltown both contend that section 204 should not apply to Milltown on the theory that Milltown is not a "recipient" of waste treatment services from the MCUA. According to the defendants' reading of the statute and its implementing regulations, Milltown is not a recipient for two reasons: (i) Milltown does not discharge waste water in to the MCUA system directly; rather, it disposes of its waste water by transmitting it to New Brunswick in accordance with the contractual relationship between those two municipalities; and (ii) Milltown is not a "subscriber" to services provided by MCUA. If section 204 is found to apply to Milltown, defendants argue, in the alternative, that section 204 is unconstitutional since it would abrogate an existing contract between Milltown and New Brunswick, and that the EPA's decision "to force the MCUA to exact user charges from Milltown" is wholly irrational and contrary to public policy. EPA, on the other hand, interprets both section 204 and the regulations, particularly 40 C.F.R. § 35.929-2(e), as applying to the situation here and as requiring Milltown to pay user charges before full grant funds may be transferred to the MCUA. EPA further maintains that the section is fully constitutional and that the decision to enforce the user charge requirement is rational.

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[3] In an affidavit submitted by the government after oral argument, the EPA has suggested that the withholding of grant money from MCUA is not solely due to Milltown's failure to adopt a user charge system and that at least one other municipality has also failed to meet the requirement (*see* Affidavit of Edward Markus, ¶ 7).

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Under section 204(b)(1) of the Clean Water Act, 33 U.S.C. § 1284(b)(1), the EPA Administrator may not approve any grant for sewage treatment facilities

> unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that *each recipient* of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, *will pay* its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant . . . (emphasis added).

Neither the Act nor the regulations define who is a "recipient" of waste treatment services from the grantee, 33 U.S.C. § 1292; 40 C.F.R. § 35.905. Recipient is defined in *Webster's New Collegiate Dictionary* (1975) as "one that receives". To receive is defined as "to come into possession of" or "to acquire".

Given the plain meaning of "recipient" and the great deference to be accorded to statutory interpretations by the agency charged with its administration, *EPA* v. *National Crushed Stone Association*, —— U.S. ——, 101 S. Ct. 295 (1980), I find that Milltown is a recipient of waste treatment services within the meaning of section 204 of the Clean Water Act. The fact that Milltown itself does not directly place its own waste into the MCUA system or require that it waste water be treated by MCUA is not material. Since Milltown's waste water is discharged through New Brunswick into the MCUA system and receives its only treatment from the MCUA system, Milltown is inarguably a "recipient" of MCUA's treatment services.

Moreover, the fact that Milltown does not have a subscription contract with MCUA has no bearing on the defendants' claims here because the application of the statute is not limited to subscribers. The statute itself does not refer to subscribers but only to recipients of waste treatment services. The regulations specifically deal with municipalities contributing wastes to the treatment works regardless of whether such municipalities are "subscribers". While 40 C.F.R. § 35.929-2(e) provides that if the application is for a "regional treatment system accepting wastewaters from other municipalities" all "subscribers" must adopt user charge systems, the regulation also continues to require that *all* municipalities contributing wastes to the system to adopt user charges:

> These user charge systems shall also be incorporated in appropriate municipal legislation enacted or other appropriate authority of *all municipalities contributing to the treatment works* . . . (emphasis added.)

Similarly, 40 C.F.R. § 35.929-1, which sets forth the general requirement for user charge systems, does not limit the user charge requirements to the grantee's "subscribers". If the grantee's user charge system is based on actual use, that system may be approved "if each *user* . . . pays its proportionate share of operation and maintenance . . . costs". 40 C.F.R. § 35-929-1(a) (emphasis added). Thus, even though Milltown does not have a subscription contract with MCUA it nonetheless must adopt user charges before MCUA may receive full grant funds from EPA.

My interpretation of the Act's user charge requirements and its implementing regulations is consistent with the underlying purposes and policies of the Act. Legislative his-

tory reveals that Congress' purpose in providing for a user charge system was twofold: first, it was enacted "as a means of assuring that each federally assisted facility would have adequate operation and maintenance funds", and, second, the system was intended to be "a positive force in encouraging more efficient management of wastes discharged through a municipal system as well as an economic inducement to reduce excessive use". S. Rep. No. 93-370, 95th Cong., 1st Sess. (1977), *reprinted in* [1977] U.S. Code & Cong. Ad. New 4326, 4352. Requiring Milltown to pay for its proportionate share of the cost of operation and maintenance for the MCUA facility clearly furthers the joint objectives of conservation and financial security. Unless Milltown adopts its own system of user charges there is simply no incentive on individual or industrial users within Milltown to decrease their water consumption and thereby decrease discharges in the MCUA facility. Moreover, should New Brunswick break its contract with Milltown and cease paying for the costs of treating Milltown's wasts, MCUA would, in the absence of a user charge system in Milltown, be faced with a revenue shortfall.

Defendants point to legislative history which also reflects a congressional determination that EPA "take into account the diversity of legal and financial factors that exist from jurisdiction to jurisdiction" and that EPA permit to each applicant "reasonable flexibility in the design of a system of user charges that meet the unique requirements of his own jurisdiction". S. Rep. No. 92-414; 92nd Cong., 2nd Sess. (1972), *reprinted in* [1972] U.S. Code & Cong. Ad. News, 3668, 3695 This flexibility, however, is qualified by the further determination that "[a]s a general rule, the volume and character of each discharge into a publicly owned system should

form the basis of determining the rate at which each user should be required to pay". *Id.* Thus, to fulfill the purposes of the Act, Milltown must be considered a "recipient of waste treatment services" within MCUA's jurisdiction, and must adopt a system of user charges as required by section 204 and its implementing regulations.

Having determined that the Clean Water Act authorizes the EPA to withhold grant funds from the MCUA in these particular circumstances, the question must now be addressed whether the Act so interpreted unlawfully impairs Milltown's contract with New Brunswick or is otherwise invalid or contrary to public policy.

The Contract Clause protects against actions by states impairing the obligations of contracts.[4] A similar measure of protection against contract impairment by the federal government is given by the Fifth Amendment's provision that no person shall be deprived of property without due process. *Lynch* v. *United States,* 292 U.S. 571 (1933); *Perry* v. *United States,* 294 U.S. 330 (1930).

Although the prohibition appears to be absolute, neither the contract clause nor the due process clause invalidates every action by the government which interferes with a contract:

> [The government] must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired,

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[4] The Contract Clause is contained in Article I, Section 10, Clause 1 to the United States Constitution and states, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .".

> or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them.' *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908).

United States Trust Co. v. *New Jersey*, 431 U.S. 1, 22 (1977).

Thus, the Court has recognized that the government does have the right to impair existing contractual obligations if the contemplated action is reasonably necessary to further a legitimate public purpose:

> Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to public purpose justifying its adoption.
> *Id.* at 22.

Accord, Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978).[5] Moreover, when reviewing such legis-

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[5] In *Allied Structural Steel Co.* v. *Spannaus*, the Supreme Court recently struck as an impermissible violation of the Contract Clause of the Constitution a Minnesota statute which subjected the plaintiff company to a "pension funding charge" if the company terminated its pension plan or closed a Minnesota office. In so holding, the Court applied the standard set in the *United States Trust Co.* case of a reasonable necessity to further a legitimate public pur-

(Footnote continued on following page)

lation, courts generally defer to the legislative judgment as to the necessity and reasonableness of the Act. *United States Trust Co.* v. *New Jersey, supra,* at 23.

In enacting section 204 and requiring the adoption of user charges applicable to all users as a prerequisite to the receipt of EPA grant funds, Congress was acting in its sovereign capacity to protect the environment, pursuant to its commerce power and its power to protect the public health and welfare. Since the protec-

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(Footnote continued from preceding page)

pose, and considered persuasive four factors: that (i) "[t]he law was not even purportedly enacted to deal with a broad, generalized economic and social problem", (ii) the law "invaded an area never before subject to regulation by the State", (iii) the law "worked a severe, permanent, and immediate change in those relationships—irrevocable and retroactively", and (iv) "its aim was leveled . . . only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees." 438 U.S. at 250. None of these factors are present in the instant suit. First of all, the Clean Water Act was enacted to deal with a recognized social problem—that of pollution and water conservation. Second, the Act operates in an area already clearly subject to extensive regulation by both the state and federal government. Third, the user charge system need not work a severe or permanent change in the contractual relations between Milltown and New Brunswick since they can continue their relationship simply minus the EPA's grant money. And, finally, the aim of the user charge system was clearly leveled at *all* users of the waste treatment system and not at just a few special participants. Thus, the Court's conclusion in *Allied Structural Steel* that "if the Contract Cluase means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company [providing the pension fund]", does not require a similar result in this case.

tion of the environment is a legitimate public purpose, section 204 must be upheld if it is reasonably necessary to accomplish this purpose.

The requirements of section 204 may impair the obligations of an existing contract only after a grantee has chosen to apply to EPA for construction grant funds. As such, the user charge requirement is not an automatic abrogation of all contracts involving charges for sewage treatment, but only a reasonable condition to the availability of financial assistance. Terms and conditions to federal financial assistance uniformly have been upheld against constitutional attack if those terms and conditions are reasonably related to the statutory goal. *See King* v. *Smith*, 392 U.S. 309, 333 (1968); *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

Moreover, Congress determined that a significant incentive for water conservation would be to provide individual discharges into a municipal waste treatment facility with a financial incentive to conserve water. S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977), *reprinted in* [1977] U.S. Code & Cong. Ad. News 4326, 4351-52. User charges clearly provide such an incentive to each discharger into a waste treatment system. In light of the deference to be accorded the Congressional determination concerning these financial incentives and their relationship to water conservation, *United States Trust Co.* v. *State of New Jersey, supra*, I find the specific tool employed by Congress in section 204—requiring the establishment of user charge systems as a prerequisite to federal financial assistance—to be reasonably necessary to protect the environment and achieve the specific

goals of water conservation and a decrease in water pollution.[6]

MCUA's final argument is that in requiring Milltown to adopt user charges prior to disbursement of full grant funds to MCUA, section 204 is contrary to public policy. MCUA first contends that it has no power to compel Milltown to adopt user charges and, therefore, EPA is "punishing" MCUA for something over which it has no control. MCUA also contends that section 204 requires MCUA to tortiously interfere with Milltown's contract with New Brunswick.

The arguments that EPA is "punishing" the MCUA and requiring MCUA to commit a tort against Mill-

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[6] MCUA's argument to the contrary relies primarily on an unreported oral decision of the Central District of California. *Garden States Paper Co., Inc.* v. *County Sanitation District No. 201 of Los Angeles County*, No. 78-0042-IH (C.D. Cal. Feb. 6, 1980). That case, however, is unpersuasive authority. In determining that the imposition of user charges which would contravene an existing contract was not reasonably necessary to induce improved water quality, the Garden State court merely focused on the one contract and industrial discharger that was before it. The Court found that there had been no showing that the abrogation of the single contract at issue would make any real difference on the level of general water pollution. However, given the Congressional determination that the imposition of user charges on all dischargers into a waste treatment facility would be the best incentive to conserve water and abate water pollution, the Garden State Court erroneously substituted its own judgment that user charges were not necessary to abate pollution in the one case before it. *See Minnesota* v. *Clover Leaf Creamery*, —— U.S. ——, 101 S. Ct. 659, 668-669 (1981). For this reason, I decline to follow the reasoning of the Garden State Court. *Cf. Time Container of Monroe* v. *Alexander*, No. 77-725 97 (E.D. Mich. Dec. 8, 1980) (where the Court upheld the requirement of the user charge system despite its inconsistency with an existing contract).

town overlook the fact that MCUA is under no obligation to apply for grant funds from EPA. Its obligation to comply with the treatment and discharge requirements of the Clean Water Act is completely independent of the receipt of any financial assistance from the government. *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977). Only after it applied to EPA for grant funds was MCUA obliged to comply with all requirements and conditions of the construction grants program, including the user charge requirement. *See Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Dept.*, 446 F.2d 1013, 1027-28 (5th Cir. 1971). EPA has in no way forced MCUA into anything. MCUA freely applied to EPA for grant assistance, and the EPA, in providing the assistance, expressly stated the grant program requirement of user charges. If the conditions imposed on the MCUA for the grant money force it to interfere tortiously with Milltown's contract with New Brunswick, the obvious and simple solution for MCUA is to withdraw its grant application.

At oral argument on this motion the possibility of an estoppel argument was raised for the first time and, on the Court's direction, briefed by the parties. In short, it is the contention of MCUA that EPA should be estopped from requiring Milltown to pay user charges since it was more than five years after the original Grant Agreement was entered into in 1973 that EPA first mentioned the obligation of a user charge system with respect to the Borough. According to Sol Seid, Executive Director of the MCUA, had EPA made it clear at the time it offered the grants that the Borough of Milltown would be required to adopt a sewer user charge system, the Authority would not have agreed to

accept the grants. Contrary to the MCUA's description of the events, however, the EPA did, in fact, make its position with respect to a user charge system as clear as possible. The user charge system became a mandatory condition to the receipt of funds after the 1973 grant agreement was approved and therefore notice of its requirements is relevant only to the second grant application submitted by MCUA in 1976.[7] Although the 1976 grant agreement does not specifically mention Militown by name, it did specifically condition payment of the grant on compliance with the requirements as to "user charge systems in 40 C.F.R. § 35.-935-13." This is the provision under which EPA is withholding the grant funds from MCUA at approximately 80% of the total grant. Moreover, when MCUA first informed EPA of the Milltown situation in early to mid-1979 (well after the 1976 grant had been approved), the department immediately notified MCUA of its obligation to obtain the adoption by Milltown of a user charge system, even though Milltown was an indirect discharger into the MCUA system through the New Brunswick facilities and had entered into no subscriber's agreement with MCUA. The EPA had consistently maintained this position with the MCUA. (*See* Affidavit of Edward Markus, Chief of the Raritan-Passaic Section of the New Jersey/Caribbean Water Programs Branch of the Region II Office of the EPA.) In view of the clear condition expressed in the 1976 grant agreement and the EPA's unequivocal stance in this matter, there is no basis for an estoppel theory of relief.

In conclusion, I find that section 204(b)(1) of the Clean Water Act, 33 U.S.C. § 1284(b)(1), and its implementing

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[7] *See* n. 2.

regulations authorize EPA to withhold grant funds from the MCUA until such time as the Borough of Milltown adopts a system of user charges as required by the Act. Because the EPA's options under the Act are limited to granting or not granting the funds to the Authority and do not include the power to order Milltown's generators of sewage to pay their share of costs, I decline to order the Borough of Milltown to adopt a user charge ordinance or to cease sending its sewage through MCUA's facility for treatment.

The consequences of the disposition of the summary judgment motions set forth below will be to deny all requests for relief which MCUA seeks against EPA in its third party complaint, requiring its dismissal. A further consequence of the disposition of the summary judgment motion will be to grant the first and third requests for relief set forth in EPA's counterclaim against MCUA and to deny its second request for relief.

Upon entry of the order disposing of the summary judgment motion EPA, which removed this case to this Court, will no longer be a party to these proceedings. The only issues remaining will be state issues which should be resolved by the state courts. Critical to the outcome of the case is resolution of the question whether the dramatic change in circumstances occasioned by the availability of financing under the Clean Water Act and the conditions imposed for the granting of such financing have any effect upon the pre-World War I contract between New Brunswick and Milltown which now stands as a bar to such financing. That is a question of state law which should be resolved in the state courts (or legislature).

Turning to the individual motions for summary judgment, they will be disposed of as follows:

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1. MCUA's motion for summary judgment for MCUA and against EPA "ordering review and approval of grant applications and payment of grant funds in accordance with the provisions of the Clean Water Act . . . and the regulations promulgated pursuant thereto without regard to whether [Milltown] has adopted a sewer user charge ordinance until such time, if ever, as [Milltown] commences subscribing to services provided by [MCUA]"—denied.

2. Milltown's motion for an order

(a) Entering summary judgment in favor of Milltown against EPA on the counterclaim by EPA against Milltown—granted.

(b) Entering summary judgment in favor of Milltown against MCUA on its cross-claim against Milltown—denied without prejudice in order that the questions raised may be resolved by the Courts of the State of New Jersey.

(c) Entering summary judgment against the City of New Brunswick on the Third Count of the Complaint—denied without prejudice in order that the questions raised may be resolved by the Courts of the State of New Jersey.

(d) Dismissing the remaining Counts of the Complaint without prejudice—denied.

(e) Remanding this action to the state court—granted.

3. New Brunswick's motion for summary judgment in favor of New Brunswick against Milltown and MCUA ordering Milltown to adopt a user charge ordinance and to pay its proportionate share of the treatment of its waste water in accordance with the provisions of the Clean Water Act and the regulations promulgated pursuant thereto—

denied without prejudice in order that the questions raised may be resolved by the Courts of the State of New Jersey.

4. EPA's motion for summary judgment in EPA's favor on MCUA's complaint and declaring that Section 204(b)(1) of the Clean Water Act and its implementing regulations authorize EPA to withhold grant funds from MCUA until such time as Milltown adopts a sytem of user charges as required by the Act—granted.

No costs will be allowed to any party.

EPA is requested to submit an order consistent with this opinion, giving the other parties seven (7) days to notify the Court of any objections to its form or substance.

Dated: August 11, 1981.

DICKINSON R. DEBEVOISE
United States District Judge

APPENDIX D

Order of Dismissal, Remand, etc. of the United States District Court for the District of New Jersey

(Filed—September 9, 1981)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Hon. Dickinson R. Debevoise

Civil Action No. 80-4040

CITY OF NEW BRUNSWICK,

Plaintiff,

vs.

BOROUGH OF MILLTOWN and THE MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly MIDDELSEX COUNTY SEWERAGE AUTHORITY),

Defendants,

THE MIDDLESEX COUNTY UTILITIES AUTHORITY (formerly MIDDLESEX COUNTY SEWERAGE AUTHORITY),

Defendant-Third Party Plaintiff,

vs.

THE UNITED STATES OF AMERICA, by and through its ENVIRONMENTAL PROTECTION AGENCY,

Third Party Defendant.

Appendix D

ORDER

Upon consideration of the motion of defendant-third-party plaintiff Middlesex County Utilities Authority ("MCUA") for summary judgment; the motion of defendant the Borough of Milltown ("Milltown") for summary judgment, to dismiss, and for an order of remand; the motion of plaintiff the City of New Brunswick ("New Brunswick") for summary judgment; and the motion of third party defendant the United States of America, by and through its Environmental Protection Agency ("EPA"), for summary judgment, and all the briefs, affidavits, pleadings and papers filed herein, for the reasons set forth in the opinion filed August 11, 1981, it is, by the Court, this 9th day of September 1981, hereby ORDERED that:

1. MCUA's motion for summary judgment for MCUA and against EPA "ordering review and approval of grant applications and payment of grant funds in accordance with the provisions of the Clean Water Act . . . and the regulations promulgated pursuant thereto without regard to whether [Milltown] has adopted a sewer user charge ordinance until such time, if ever, as [Milltown] commences subscribing to services provided by [MCUA]" is denied;

2. Milltown's motion for an order

   (a) entering summary judgment in favor of Milltown and against EPA on the counterclaim by EPA against Milltown is granted;

   (b) entering summary judgment in favor of Milltown and against MCUA on its cross-claim

against Milltown is denied without prejudice in order that the questions raised may be resolved by the Courts of the State of New Jersey;

(c) entering summary judgment against City of New Brunswick on the Third Court of the Complaint is denied without prejudice in order that the questions raised may be resolved by the Courts of the State of New Jersey;

(d) dismissing the remaining Counts of the Complaint without prejudice is denied;

(e) remanding the main action to the state court is granted;

3. New Brunswick's motion for summary judgment in favor of New Brunswick and against Milltown and MCUA ordering Milltown to adopt a user charge ordinance and to pay its proportionate share of the treatment of its waste water in accordance with provisions of the Clean Water Act and the regulations promulgated pursuant thereto is denied without prejudice in order that the questions raised may be resolved by the Courts of the State of New Jersey;

4. EPA's motion for summary judgment

(a) in EPA's favor dismissing MCUA's third party complaint against EPA is granted and

(b) declaring that Section 204(b)(1) of the Clean Water Act and its implementing regulations authorize EPA to withhold grant funds from

MCUA until such time as Milltown adopts a system of user charges as required by the Act is granted.

5. No costs will be allowed to any party.

Dickinson R. Debevoise
United States District Judge